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IN THE

Supreme Court of the United States

October Term, 1967.

No. 451

AMES NOWELL,

Petitioner,

vs.

MARGUERITE LOVELETT NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent prays that the petition for a writ of certiorari to review the order of the Connecticut Supreme Court dismissing the Petitioner's appeal unless counsel fees to defend that same appeal in the amount of Six Thousand ($6,000.00) Dollars be paid to the Respondent by October 3, 1967 (this order was rendered originally on May 10, 1967 and modified by an order entered on June 26, 1967) be denied in all respects.

The record on which said order is based discloses that there has not been a final judgment dismissing the Petitioner's appeal, as would be necessary for the

issuance of a writ of certiorari by this Court. The laws of the State of Connecticut recognize, for all those before its courts, a **privilege** of appeal and not a **right** of appeal as advocated by the Petitioner.

Bennett v. United Lumber & Supply Co., 110 Conn. 536, 148 A. 369 (1930)

Since the petition fails to state the material facts as required by Rule 23,1(e) of the Rules of this Court, Respondent calls to the attention of the Court the following facts which are determinative.

STATEMENT OF CONTROLLING FACTS.

The original writ, summons and complaint in the instant action was served personally on the Petitioner. in Darien, Connecticut on December 2, 1962.

On November 6, 1962, the Petitioner walked out of the family home in Darien, Connecticut and deserted the Respondent (See Amended Report of State Referee (10a). During the years 1963 and 1964 the Petitioner resided entirely in the States of New York and Connecticut and occupied his offices at 325 East 18th Street "nearly every day" (See deposition of the Petitioner taken in New York City on January 21, 1965 (14a).

The Petitioner, in every possible fashion, resisted and litigated the Respondent's Connecticut action until the filing of the Referee's Report (finding the facts in favor of the Respondent) on August 24, 1965. On March 15, 1965 the Petitioner had filed an annulment petition in the State of Texas and had

served papers on the Respondent in Connecticut. On March 24, 1965, the Petitioner was enjoined by the Connecticut Superior Court:

> "either directly or indirectly, personally or by his agents or attorneys, from prosecuting, pursuing, proceeding or, in any manner whatever, from taking action in or with regard to a certain lawsuit in the Juvenile Court of Dallas, Dallas County, Texas, or in any other jurisdiction of the State of Texas, or any other State, until the principal cause, as above captioned, shall have been heard or until further order of this Court."

Unbeknownst to anyone in Connecticut, the Petitioner had also, on March 15, 1965, filed a divorce action in Texas, which he did not pursue until September 2, 1965, nine days after the filing of the Connecticut Referee's Report. On September 2, 1965, the Respondent was, by service of papers in Connecticut, first given notice of the Texas divorce action. On September 9, 1965, the Connecticut Superior Court further enjoined the Petitioner:

> "either directly or indirectly, personally or by his agents or attorneys, from prosecuting, pursuing, proceeding or, in any manner whatsoever, from taking action in or with regard to a certain lawsuit in the Court of Domestic Relations in and for Dallas County, Texas, or in any other Court of the State of Texas, or in any other action concerned with the relationship of the parties as husband wife either in any Court of the State of Texas, or any other state, until the principal cause, as above captioned, shall have been determined or until further order of this Court."

The record of this action demonstrates that the Petitioner has been found in contempt of the orders entered by the Connecticut courts at least seven times, both for violation of injunctions issued by the Connecticut courts as well as deliberate refusals to pay alimony and counsel fees as ordered by the Superior Court. The record will also show that the Petitioner has appealed to the Connecticut Supreme Court seven times and that six previous appeals, upon each of which the Petitioner was ordered to pay counsel fees of $1,000.00, were dismissed. No part of the counsel fees on any of these previous appeals have been paid.

On May 10, 1967 the Supreme Court of the State of Connecticut ordered that the Petitioner's appeal would be dismissed if the counsel fees to defend the appeal, as ordered to be paid "forthwith" by the Superior Court for Fairfield County in the amount of Six Thousand ($6,000.00) Dollars, were not paid on or before July 1, 1967. On June 26, 1967 the Supreme Court of Connecticut, upon Petitioner's Motion to Extend Time, deferred the effective date to October 3, 1967.

NO FINAL JUDGMENT.

There has been no final judgment entered either in the State of Texas nor in the State of Connecticut. The Petitioner's appeal is still pending before the Connecticut Supreme Court, to be dismissed if counsel fees to defend that appeal are not paid by October 3, 1967. Until there has been an order dismissing the Petitioner's appeal, there has been no final

judgment from which a petition for writ of certiorari to this Court may be taken. 28 U.S.C. Sec. 1257(3).

NO FEDERAL QUESTION.

It is axiomatic that jurisdiction for a petition for certiorari depends upon a federal question being raised, and, where such question is lacking, the petition must be denied.

> **Brinkerhoff-Faris Trust & Savings Co. v. Hill,** 281 U.S. 673 (1929)
>
> **Board of Supervisors v. Santa Cruz Railroad Co.,** 111 U.S. 362 (1884)

There is no doubt that attorney's fees may be allowed a wife by Connecticut courts in a divorce action to insure that the wife is not deprived of her rights.

> **Krasnow v. Krasnow,** 140 Conn. 254, 99 A.2d 104 (1953).

Therefore, the judgment for counsel fees rendered by the Superior Court of Connecticut was in accordance with recognized legal principles of the State of Connecticut.

The order entered by the Connecticut Supreme Court, while without memorandum, has substantial basis under Connecticut law.

The motion to dismiss the appeal in the instant case was filed under the provisions of Section 679

of the Connecticut Practice Act, which reads as follows:

> "Any claim that an appeal or writ of error should be abated or dismissed, whether based on lack of jurisdiction, failure to file papers within the time allowed, failure to prosecute with proper diligence or any **other ground,** shall be made by a motion to dismiss the appeal or writ. Any such motion must be filed in accordance with Sections 687 to 689 inclusive within ten days after the filing of the appeal or the return day of the writ, or if the ground alleged subsequently occurs, within ten days after it has arisen, provided a motion based on lack of jurisdiction or a failure to prosecute with proper diligence may be filed at any time."
>
> (Emphasis supplied)

The motion to dismiss raised a question not unlike that raised to the Connecticut Supreme Court in the case of **State v. Ward,** 134 Conn. 81; 54 A.2d 494 (1947). In that case the Connecticut Supreme Court dismissed the appeals of two of the defendants for failing to pay the required fees for printing the evidence in connection with the presentation of the case on appeal. Further, there is no constitutional requirement that an appeal must be allowed from any judgment. It has been said:

> "There is no constitutional requirement that an appeal must be allowed from any judgment nor is it required by the principles of natural justice, and consequently an appeal is no more than a 'statutory privilege'. There is no vested

right to an appeal nor is provision for an appeal required under the constitutional requirement of due process of law."

Maltbie: Conn. Appellate Procedure Section 1 (And cases cited therein)

THE ALLEGED TEXAS JUDGMENT IS NOT GERMANE TO THE INSTANT PROCEEDINGS.

The Texas divorce judgment which the Petitioner proclaims so vociferously in defense of the Connecticut proceedings is not even final and, for that reason alone, would not be entitled to full faith and credit.

Swift v. McPherson, 232 U.S. 51 (1914); **Chapman v. John St. John Drilling Co.,** 73 N.M. 261, 387 P.2d 462 (1963).

Moreover, even if it were final, it was obtained by the Petitioner in contemptuous violation of the Connecticut injunctive orders which were personally binding upon him and which should have been obeyed.

Wehrhane v. Peyton, 134 Conn. 486, 496; 58 A.2d 698 (1948)

However, the instant petition for certiorari does not present for determination by the Supreme Court of the United States the relative merits of the Connecticut and Texas actions. The instant petition only involves the dismissal of an appeal for failure of the Petitioner to abide by court orders relating to the appeal.

The Petitioner is in contempt of every order en-

tered by the Connecticut Superior Court. The appeal was properly dismissed under the doctrine that the Court may properly refuse aid to an individual who has violated a court order or orders and is in contempt of court.

Wehrhane v. Peyton, Supra

CONCLUSION.

In the instant action justice requires that the Petitioner not be permitted to maintain an appeal while he is in contempt of court orders and while he has failed to pay counsel fees to the Respondent's attorneys which had been properly ordered to be paid as a condition precedent to the maintenance of his appeal.

For the foregoing reasons, the petition for writ of certiorari should be denied in all respects.

Respectfully submitted,

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APPENDICES